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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UTAH NEWSPAPER PROJECT, dba CITIZENS FOR TWO VOICES, Plaintiff, v. DESERET NEWS PUBLISHING COMPANY and KEARNS-TRIBUNE, LLC, Defendants.	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO KEARNS-TRIBUNE, LLC'S MOTION FOR PROTECTIVE ORDER CONFIRMING CONFIDENTIALITY DESIGNATION** Civil No. 2:14-cv-00445-JNP-BCW Judge Jill N. Parrish

Plaintiff Utah Newspaper Project, dba Citizens For Two Voices, hereby submits this memorandum in opposition to Defendant Kearns-Tribune's "motion for protective order confirming confidentiality designation" (dkt. no. 94), stating as follows:

INTRODUCTION

This case involves significant issues of public interest; specifically, Plaintiff alleges that the Defendant newspapers acted unlawfully and in violation of federal antitrust laws by entering

into their October 2013 joint operating agreement. *See* generally, amended complaint (dkt. no. 44). Plaintiff claims that the very livelihood of the *Tribune* newspaper is at stake.

Before the Court is a motion for protective order filed by Defendant Kearns-Tribune, LLC ("K-T"). K-T asks the Court to affirm K-T's designation of 64 documents produced in this case as confidential or attorney's eyes only pursuant to the terms of the District of Utah blanket protective order governing this case. As discussed herein, the Court should deny K-T's motion.

Initially, K-T has failed to address any particular prejudice or harm allegedly resulting from disclosure of any specific document, and rather has only addressed the documents in broad, general categories. As such, K-T has failed to meet its burden of proving good cause for the application of the standard protective order to the documents at issue as is required by Rule 26(c) of the Federal Rules of Civil Procedure. Moreover, even assuming *arguendo* the protective order applies to the documents, K-T still has not shown that any specific document falls within the definition of "confidential information" or "confidential information – attorneys eyes only" as used in the protective order, warranting denial of its motion on such basis as well.

Accordingly, given the significant public interest at stake and K-T's failure to meet its burden of proof, Plaintiff requests that the Court deny K-T's motion and order that the documents at issue are not subject to the protective order, are not confidential or attorneys eyes only, and may be publically disclosed.

STATEMENT OF FACTS

1. The district of Utah has adopted a district-wide blanket protective order that applies in civil cases pending before the Court ("standard protective order"). *See* District of Utah Local Rule 26-2(a).[1]

2. The standard protective order places the burden of proving confidentiality or AEO status on the producing party who claims such status. *See* District of Utah form standard protective order at ¶ 9.[2]

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[1] DUCivR 26-2 STANDARD PROTECTIVE ORDER AND STAYS OF DEPOSITIONS:

(a) Standard Protective Order

The court has increasingly observed that discovery in civil litigation is being unnecessarily delayed by the parties arguing and/or litigating over the form of a protective order. In order to prevent such delay and "to secure the just, speedy, and inexpensive determination of every action," the court finds that good cause exists to provide a rule to address this issue and hereby adopted this rule entering a Standard Protective Order.

(1) This rule shall apply in every case involving the disclosure of any information designated as confidential. Except as otherwise ordered, it shall not be a legitimate ground for objecting to or refusing to produce information or documents in response to an opposing party's discovery request (e. g. interrogatory, document request, request for admissions, deposition question) or declining to provide information otherwise required to be disclosed pursuant to Fed.R. Civ. P. 26 (a)(1) that the discovery request or disclosure requirement is premature because a protective order has not been entered by the court. Unless the court enters a different protective order, pursuant to stipulation or motion, the Standard Protective Order available on the Forms page of the court's website http://www.utd.uscourts.gov shall govern and discovery under the Standard Protective Order shall proceed. The Standard Protective Order is effective by virtue of this rule and need not be entered in the docket of the specific case.

(2) Any party or person who believes that substantive rights are being impacted by application of the rule may immediately seek relief.

3. At the outset of this case, K-T (and Defendant Deseret) filed a motion with the Court seeking to amend that critical provision of the standard protective order, requesting that the Court impose the burden of *dis*proving confidentiality to Plaintiff. *See* Defendants' joint motion for protective order (dkt. no. 70).

4. In their motion, Defendants represented that "the Salt Lake Tribune and the Deseret News have already invested considerable time and expense in reviewing and producing to the Department of Justice approximately half a million pages (or approximately 250 banker boxes of documents), carefully screening such records for purposes of relevance and privilege." Defs.' Motion for Protective Order at p. 6 (dkt. no. 70). Based upon the claimed extent of documents already reviewed and the stated desire to avoid further expense in re-reviewing those documents, Defendants claimed it was necessary to place the burden of disproving confidentiality to Plaintiff, the non-producing party.

5. Plaintiff opposed Defendants' motion, arguing that the standard protective order should apply to this case and that Defendants had not established grounds for switching the burden of disproving confidentiality to Plaintiff. *See* Plaintiff's mem. opp. Defs.' mtn. pro. order (dkt. no. 72).

6. In its opposition to Defendants' motion, Plaintiff also pointed out that despite the presence of the Court's standard protective order, the party claiming confidentiality under the protective order would still have to prove good cause as required by Rule 26(c) of the Federal Rules of Civil Procedure. *Id*. at pp. 6-8 (outlining good cause requirement).

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[2] Available online at *www.utd.uscourts.gov/forms/Standard_Protective_Order.pdf.*

7. In ruling on Defendants' joint motion for protective order, the Court agreed with Plaintiff and denied Defendants' motion, ruling that the District's standard protective order governs this case. *See* order dated January 15, 2015 (dkt. no. 75).

8. The standard protective order defines "protected information," "confidential information," and "confidential information - attorneys eyes only" ("AEO") as follows:

> 2. Definitions
>
> (a) The term PROTECTED INFORMATION shall mean confidential or proprietary technical, scientific, financial, business, health, or medical information designated as such by the producing party.
>
> (b) The term CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, shall mean PROTECTED INFORMATION that is so designated by the producing party. The designation CONFIDENTIAL - ATTORNEYS EYES ONLY may be used only for the following types of past, current, or future PROTECTED INFORMATION: (1) sensitive technical information, including current research, development and manufacturing information and patent prosecution information, (2) sensitive business information, including highly sensitive financial or marketing information and the identity of suppliers, distributors and potential or actual customers, (3) competitive technical information, including technical analyses or comparisons of competitor's products, (4) competitive business information, including non-public financial or marketing analyses or comparisons of competitor's products and strategic product planning, or (5) any other PROTECTED INFORMATION the disclosure of which to non-qualified people subject to this Standard Protective Order the producing party reasonably and in good faith believes would likely cause harm.
>
> (c) The term CONFIDENTIAL INFORMATION shall mean all PROTECTED INFORMATION that is not designated as "CONFIDENTIAL - ATTORNEYS EYES ONLY" information.

9. Despite K-T's representations regarding it having reviewed and produced to the Department of Justice around 250 bankers boxes of relevant documentation, K-T produced a

mere 106 documents in this case on February 27, 2015 in connection with its Rule 26(a) initial disclosures.

10. Of those documents, K-T designated all but one document as confidential or AEO, excepting only the joint operating agreement. Documents K-T marked confidential included blank pages (DFM-JB-0000008937) and documents already filed with the Court (DFM-PR-0000001062). Documents K-T marked AEO included documents undisputedly possessed by other parties (DFM-JB-0000008942; DFM-JB-0000008944).

11. In compliance with the provisions of the standard protective order Plaintiff notified K-T of its objections to K-T's designations of the documents as confidential or AEO. Attached to K-T's motion is the table that Plaintiff prepared that summarizes Plaintiff's objections to K-T's documents under the terms of the standard protective order, which table Plaintiff provided to K-T when it made its original objections. *See* Declaration of Litwin at Exhibit 2 (dkt. no. 93). In response, K-T added the right-hand column setting forth its responses to Plaintiff's objections. *See id.* Plaintiff hereby incorporates its specific objections as set forth in the table (s*ee* F.R.C.P. 10(c)).

12. In response to Plaintiff's objections, K-T admitted that 41 documents were, in fact, not confidential and withdrew the designation as to those documents. As to the remaining 64 documents, K-T stood by its confidential and AEO designation. It also amended its designations as to three documents not previously marked as AEO but which it switched to AEO status.

13. The remaining documents as to which K-T did not withdraw its confidentiality or AEO designation are referred to herein as "the Documents."

ARGUMENT

I. THE COURT SHOULD DENY K-T'S MOTION AND RULE THAT K-T HAS FAILED TO SHOW GOOD CAUSE FOR APPLICABILITY OF THE PROTECTIVE ORDER TO THE DOCUMENTS.

The Court should deny K-T's motion seeking to affirm its confidential and AEO designations of the Documents. Significantly, K-T does not even provide the Documents for the Court's consideration or discuss the alleged harm or prejudice resulting from disclosure of any specific document. Rather, K-T merely attaches "examples of designated documents" (dkt. no. 93 at ¶ 7) and breaks down the Documents into six broad categories.[3] According to K-T, documents in categories one through three are confidential and documents in categories three through six are AEO. *See* K-T mem. at pp. .4-7 (dkt. no. 94). (K-T asks the Court to take its word for it, insomuch as K-T fails to provide all of the Documents for the Court's consideration).

As discussed below, K-T's arguments misapprehend the applicable legal standards, as K-T has failed to analyze whether there is good cause for applying the standard protective order to the Documents in the first place. Given the public interest at stake in this case, K-T has not met its burden of showing good cause for applying the protections of the blanket protective order to

[3] The categories are: 1) discussions and valuations regarding the potential sale of *The Salt Lake Tribune*; 2) internal business strategies, contractual negotiations, and past and projected financial performance; 3) human resources records and other private employee data; 4) detailed financial data and valuation information; 5) contractual terms; 6) discussions regarding the possible termination of the JOA.

the Documents produced in this case. As such, K-T has failed to meet its burden and the Court should deny its motion.

a. The presumption that civil discovery is not confidential and subject to public disclosure can only be overcome by a particularized showing of good cause.

Historically both criminal and civil proceedings have been presumptively open to the public. *See e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 401 (1984); *Richmond Newspapers v. Va.*, 448 U.S. 555 (1980)[4]; *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976). Furthermore, the U.S. Supreme Court has recognized a public right of access to court records. *See Nixon v. Warner Communications*, 435 U.S. 589 (1978).

The public's right of access has its roots in both the common law and the First Amendment. *See e.g., U.S. v. McVeigh*, 119 F.3d 806, 811-12 (10th Cir. 1997) (explaining the public right of access under both the common law and the First Amendment).[5] A litigant's First

[4] The U.S. Supreme Court has never expressly decided whether the public right of access applicable to criminal proceedings applies to civil proceedings, but there is a strong suggestion in *Richmond Newspapers* that such a right does exist as it relates to civil proceedings. There, the Court noted that, "[w]hether the public has a right to attend civil cases is a question not raised by this case, but we note historically both civil and criminal cases have been presumptively open." *Richmond Newspapers*, 457 U.S. at 580 n.17.

[5] *See also U.S. v. Pickard*, 733 F.3d 1297 (10th Cir. 2013); *Riker v. Fed. Bureau of Prisons*, 315 Fed. Appx. 752 (10th Cir. 2009); *Lanohere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994); *U.S. v. Hickey*, 767 F.2d 705 (10th Cir. 1985); *Mocek v. City* of *Albuquerque*, 3 F. Supp. 3d 1002 (D. N.M. 2014); *BYU v. Pfizer, Inc.*, 281 F.R.D. 507 (D. Utah 2012); *Huddleson v. City of Pueblo*, 270 F.R.D. 635 (D. Colo. 2010); *U.S. v. Mitchell*, 2010 U.S. Dist. LEXIS 21004; *Am. Friends Serv. Comm. v. City & County of* Denver, 2004 U.D. Dist. LEXIS 18474; *Grundberg v. Upjohn*, 140 F.R.D. 459 (D. Utah 1991); *Combined Communications Corp. v. Boger*, 689 F. Supp. 1065 (W.D. Okla. 1988); *Soc'y of Prof'l Journalists v. Briggs*, 675 F. Supp. 1308 (D. Utah

Amendment right encompasses the right to share what they learn in discovery with other persons, the public, and the news media, as they see fit. *See Jepson, Inc. v. Makita Elec. Works*, Ltd., 30 F.3d 854, 858 (7th Cir. 1994); *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978) ("…as a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings."). Thus, in determining whether to deny public access to court proceedings or documents, courts must consider the bedrock principles that the public should have open access to judicial proceedings and that the parties have constitutional interest in freely disclosing documents generated via civil discovery, and weigh those considerations against the competing interest in protecting confidential information. *See United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997) (noting that, "both the common law and First Amendment standards ultimately involve a balancing test," and that proceedings may be sealed and access to documents may be restricted "if the right to access is outweighed by the interests favoring [sealing proceedings and/or] nondisclosure").

Because a protective order infringes these presumptive rights to access and disclosure, it must be based on good cause. *See* Fed. R. Civ. P. 26(c); *Rohrbough v. Harris*, 549 F.3d 1313, 1321 (10th Cir. 2008) (citing *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Foltz v. State Farm Mut. Auto. Ins. Co*., 331 F.3d 1122 (9th Cir. Or. 2003) ("A party asserting good cause bears the burden, for each particular document it seeks to protect, of

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1987); *Huntsman-Christensen Corp. v. Entrada Industries, Inc.*, 639 F. Supp. 733 (D. Utah 1986); *Society of Professional Journalists v. Secretary of Labor*, 616 F. Supp. 569 (D. Utah 1985).

showing that specific prejudice or harm will result if no protective order is granted."); *see also, Gelb v. Am. Tel. & Tel. Co.*, 813 F. Supp. 1022, 1034 (S.D.N.Y. 1993) ("With respect to [a] claim of confidential business information, [the good cause] standard demands that the company prove that disclosure will result in a clearly defined and very serious injury to its business."); *Parsons v. Gen. Motors Corp*., 85 F.R.D. 724, 726 (N.D. Ga. 1980) (finding the "good cause" requirement "to mean that the party seeking the protective order must demonstrate that the material sought to be protected is confidential and that disclosure will create a competitive disadvantage for the party").

Courts apply a balancing test to determine whether good cause is present, evaluating the following factors: (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefiting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d Cir. 1994); *see also, In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig*., 669 F.2d 620, 623 (10th Cir. 1982).

In other words, a party "show[s] good cause by demonstrating a particular need for protection." *Cipollone v. Liggett Group, Inc*., 785 F.2d 1108, 1121 (3d Cir. 1986). Numerous courts have recognized that conclusory allegations, unsupported by specific evidence, do not

establish good cause and therefore do not justify the issuance of a protective order. *See, e.g., id.* ("Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," are insufficient to show good cause); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) ("'Good cause' is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury. Broad allegations of harm, unsubstantiated by specific examples, however, will not suffice."); 8B *Charles Alan Wright & Arthur R. Miller,* Federal Practice and Procedure Civil § 2035 (3d ed. 2015) ("The courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause" supporting a protective order.) (compiling cases).

b. Blanket or standardized protective orders do not dispense with Rule 26(c)'s required showing of "good cause"; the proponent must still show good cause for protection of each specific document.

Here, the Court is not relieved from considering whether good cause exists simply because the district has adopted a district-wide standard protective order that automatically applies in every case. Protection by a blanket protective order is only provisional and does not dispense with the requirement that the proffering party make a showing of good cause as required by Rule 26. *See Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988) ("Although . . . blanket protective orders may be useful in expediting the flow of pretrial discovery materials, they are by nature overinclusive and are, therefore, peculiarly subject to later modification."); *Cipollone supra at* 1122 ("After the documents [are] delivered under this umbrella order, the opposing party could indicate precisely which documents it believed to be not confidential, and the movant would have the burden of proof in justifying the protective

order with respect to those documents."). Thus, for the discovery to be protected as confidential under a blanket protective order, the court must find good cause to protect the specific documents at issue. *Id.* "Blanket" protective orders require particularly heavy burden, requiring a showing that disclosure will cause a "clearly defined and very serious injury." *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981).

c. Based on the significant public interest at issue, K-T has not satisfied its burden of showing good cause for applicability of the protective order to the Documents.

K-T repeatedly argues throughout its motion that Plaintiff has failed to make an adequate showing of grounds for objection to confidentiality. K-T's arguments constitute an improper attempt to shift the burden of proof to Plaintiff and should be rejected on such basis. More importantly, though, K-T has failed to make a showing of good cause for applicability of the standard protective order in the first place. It is not enough to "[s]imply mention[] a general category of privilege." *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1184 (9th Cir. 2006). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Cipollone*, *supra* at 1121.

Even assuming only for the sake of argument that certain of K-T's Documents contain private or confidential business information, that does not end the inquiry. The Court is still required to weigh whether K-T's interest in protecting its allegedly secret information outweighs the public's interest in the subject of the case, especially information relevant to public health and safety. *See Pansy*, *supra* at 786-787; *see also, Shingara v. Skiles*, 420 F.3d 301, 308 (3d Cir. 2005) ("[A] court always must consider the public interest when deciding whether to impose a

protective order."); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) ("[T]he analysis [of good cause] should always reflect a balancing of private versus public interests."); *In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 298 (Cal. Ct. App. 2002) ("The mere presence of a claimed trade secret does not carry a mandatory confidentiality requirement.").

This case implicates matters of dire public concern and "health" that outweigh any interests advanced by K-T in confidentiality of the Documents. Plaintiff alleges several violations of antitrust law which violations Plaintiff contends threaten the very survival of the *Tribune*. As reflected in the previously filed declarations of journalist Don Gale, Sen. Curt Bramble, local businessman Jeff Miller, and former journalist Joan O'Brien (dkt. nos. 3-5, 3-6, 3-7, 3-9), the public's interest in maintaining a newspaper that performs investigative journalism and is wholly independent of the owner of the competing daily newspaper is of vital importance not just to the Salt Lake Valley but to the entire state. That issue is sufficiently important that it can be said to constitute a matter of "public health." *See Pansy, supra* at 786-787.

Furthermore, Plaintiff has alleged that the October 2013 changes to the Joint Operating Agreement were made without public knowledge, and that but for an anonymous tipster, the those changes and effect on the *Tribune* would have likely remained undiscovered. *Amended Complaint* at pp. 4, ¶ 8; 5, ¶ 12 (dkt. no. 44). As Plaintiff has alleged and will prove, Defendants conspired to hide their conduct from the public and the Department of Justice ("DOJ") by unlawfully characterizing their entire re-write and re-structure as a mere amendment of the joint operating agreement. Plaintiff and others requested a formal investigation by the DOJ into alleged antitrust violations as a result of the anonymous tip, but the DOJ's investigation is in the

preliminary stages and is unlikely to produce any information to the public for some time. Therefore, it is especially important that the public gain access to those materials surrounding the October 2013 JOA, which Plaintiff alleges is aimed at closing the *Tribune*.

"Common sense tells us that the greater motivation a corporation has to shield its operations, the greater the public's need to know." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983). Secrecy allows wrongdoing to continue and undermines trust in the justice system. The public's interest in the competitive editorial voices offered by two local newspapers outweighs the interest of alleged monopolizers in maintaining the secrecy of the documents that are relevant to their unlawful conduct. K-T's motion should be denied.

II. EVEN IF THE COURT CONCLUDES THAT K-T HAS MET ITS BURDEN OF SHOWING GOOD CAUSE, OR THAT THE GOOD CAUSE REQUIREMENT DOES NOT APPLY, K-T STILL HAS NOT ESTABLISHED THAT THE DOCUMENTS ARE "CONFIDENTIAL INFORMATION" OR "CONFIDENTIAL - ATTORNEYS EYES ONLY" AS DEFINED BY THE PROTECTIVE ORDER.

K-T claims that the Court should find each of the 64 documents at issue is confidential and/or AEO, but K-T fails to analyze independently each of the documents. Nor has K-T given the Court the opportunity to do so, as K-T has not even provided those documents for the Court to review. Coupling these deficits, K-T's motion does not bother to identify any specific harm or prejudice allegedly resulting from disclosure of the categories of Documents, let alone any specific Document. Those deficiencies are fatal to its motion.

As the Court observed in connection with Defendants' initial motion for protective order, "The Court finds Defendants have not adequately shown how they will be harmed or impacted if the Standard Protective Order is entered in this case. Generically arguing that their business

interests will be harmed by public disclosure of documents does not provide the Court with enough information to make a reasoned decision as to whether good cause exists to deviate with the Court's standard practice." *See* Order denying Defendants' mtn. pro. order (dkt. no 75 at pp. 4-5).

The same conclusion applies here. By failing to attach all 64 Documents, by discussing only categories of Documents, and by failing to identify any specific harm or prejudice resulting from disclosure, K-T has not provided the Court with enough information to enable the Court to conclude that the Documents warrant protected status as "confidential information" or "confidential – attorneys eyes only" under the protective order. K-T's motion should be denied.

CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests the Court deny K-T's motion and order that K-T has not shown good cause and that the Documents therefore are not confidential.

DATED this 4th day of April, 2016.

CHRISTENSEN & JENSEN, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2016, a true and correct copy of the foregoing **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO KEARNS-TRIBUNE, LLC'S MOTION FOR PROTECTIVE ORDER CONFIRMING CONFIDENTIALITY DESIGNATION** was delivered via the court's electronic filing system to the following:

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